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J v J

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HIGH COURT (IPOH) — DIVORCE PETITION NO AA-33–124–03 OF 2018
SU TIANG JOO JC
2 OCTOBER 2020

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Civil Procedure — Contempt of court — Committal proceedings — Whether requirement of personal service of sealed copy of the access order can be dispensed with — Whether prior notice to show cause was given — Effect of lack of endorsement of penal notice — Whether respondent had disobeyed access order — Rules of Court 2012 O 45, O 52 rr 2B, 4(4)

D

Civil Procedure — Contempt of court — Sentence — Whether mens rea was an ingredient to be proved in contempt proceedings — Whether custodial sentence was appropriate

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The petitioner wife applied for an order for committal ('encl 99') against the respondent husband for contempt of an access order dated 9 December 2019 ('the access order') allowing the petitioner to visit and bring their three children out between 16 to 26 December 2019. The petitioner's position was that on 24 December 2019, the petitioner went to the house to take her children out. The respondent allegedly opened the door and when the petitioner requested for their children to go out, they informed the petitioner that they could not go out with her because the respondent refused to allow them out. The petitioner left the house and lodged a police report on this incident on the same day. The following day, the respondent allegedly again refused to allow the petitioner to take their children out despite the petitioner having given notice to the respondent of her intention to do so, the day before. The petitioner lodged another police report on this incident. The petitioner contended that the respondent had deliberately committed contempt of the access order; the respondent had no respect at all for the authority of the court and had deliberately refused to obey the access order. The issues that arose in the High Court were: (a) non-service of the sealed copy of the access order; (b) whether prior notice to show cause was given; (c) the effect of lack of endorsement of penal notice; and (d) whether the respondent had disobeyed the access order.

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Held, allowing the application and issuing an order for committal sentencing the respondent to ten days imprisonment:

(1) The court referred to the Federal Court case of *TO Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151 which held that if the contemnor had

knowledge of the terms of the court order though it had not been served, the court had the discretion to dispense with the requirement of personal service and this discretion was provided under O 52 r 4(4) of the Rules of Court 2012. From the facts in the instant case, the court found that the respondent and his solicitors were very much aware of the terms of the access order which were simple and detailed as to the date, time and manner for access. Therefore, the court found that the non-service of the sealed copy of the access order had not prejudiced the respondent in any way and if at all necessary, the court dispensed with service of the sealed copy of the access order on the respondent (see paras 32–34).

(2) The court found that sufficient prior formal notice to show cause had been given to the respondent. The respondent had ample notice of what was required of him, which was to allow the petitioner to take their children out on both 24 December 2019 and 25 December 2019. The court was of the view that that even if there were any verbal deficiencies in the prior show cause notice given via WhatsApp, the same had not prejudiced the respondent (see paras 37–38).

(3) With the ex parte leave order of 20 February 2020 being lawfully on foot and having found that the respondent was fully aware of the terms of the access order, that prior notice of show cause for non-compliance had been given and with the respondent having affirmed in his affidavit that the petitioner did go to their matrimonial home to pick up their young children on both 24 December 2019 and 25 December 2019 with him being present but that the petitioner was not able to do so, the court found that the respondent had disobeyed the access order (see para 39).

(4) In the committal proceedings, it was clear that the petitioner was not seeking for the respondent to be committed for contempt for refusing to go along with the petitioner and the children. Therefore, the committal proceedings were not grounded upon the respondent having failed to do any positive acts required of him under the access order. Instead, as the children were under the custody, care and control of the respondent, the respondent ought not to in any way prevent the petitioner from having access which as per the terms of the order allows her to take their children out. With the three children being of tender years, the court did not accept that the children would on their own volition refuse to go out with their mother, more so when their mother had been taking them out as from 16 December 2019 with only three more limited days to go by 24 December 2019. In the circumstances, the court found that the lack of an indorsement of a penal notice was not fatal to the committal proceedings (see paras 54–56).

(5) If the court could dispense with the service of an order under O 45 r 7(7) of the Rules of Court 2012 which may require the indorsement of a penal notice, if it thinks it just to do so, a failure to indorse a penal notice was

surely not mandatory in every case. If at all necessary, the court was of the view that it was just, in the circumstances of this case, for the need for the service of the access order upon the respondent to have been dispensed with and with such dispensation, the need for a penal notice, if at all necessary, no longer became an issue. For the sake of good order, the court again formally dispensed with service of a sealed copy of access order and the need for indorsement of a penal notice and such dispensation was with retrospective effect (see para 57).

(6) On lack on intention to disobey the access order, the law was clear that mens rea was not an ingredient to be proved in contempt proceedings. The corollary to there being no necessity to prove mens rea was that lack of intention did not prevent a contemnor from being found guilty of contempt (see paras 66–67).

(7) The court was of the view that a custodial sentence was appropriate for the respondent to reflect upon the contempt he had shown and how the administration of justice had been perverted by the same. On this, if the punishment to be meted was for a past offence, then if the respondent was to be imprisoned, the appropriate order was a fixed term (see para 70).

[Bahasa Malaysia summary

Pempetisyen telah memohon perintah pengkomitan ('lampiran 99') terhadap responden kerana menghina mahkamah dengan tidak mematuhi perintah akses bertarikh 9 Disember 2019 ('perintah tersebut') yang membenarkan pempetisyen melawat dan membawa ketiga anak mereka keluar antara 16 hingga 26 Disember 2019. Pempetisyen menghujahkan bahawa pada 24 Disember 2019, pempetisyen telah ke rumah untuk mengambil anak-anaknya. Responden telah membuka pintu dan apabila pempetisyen mengajak anak-anaknya keluar, mereka memberitahu pempetisyen bahawa mereka tidak boleh mengikut pempetisyen kerana responden enggan membenarkan mereka keluar. Pempetisyen telah meninggalkan rumah itu dan membuat laporan polis di atas insiden itu pada hari yang sama. Hari kemudiannya, responden telah sekali lagi enggan membenarkan anak-anaknya untuk untuk keluar bersama-sama pempetisyen walaupun pempetisyen telah memberikan notis kepada responden untuk berbuat demikian. Pempetisyen menghujahkan bahawa responden dengan sengaja tidak mematuhi perintah tersebut dan berniat menghina mahkamah. Isu-isu yang perlu diputuskan oleh mahkamah adalah: (a) penyerahan perintah akses itu tidak disempurnakan; responden tidak mematuhi perintah tersebut dan sengaja menghina mahkamah; (b) sama ada notis tunjuk sebab telah diberikan; (c) kesan ketiadaan pengindorsan notis penal; dan (d) sama ada responden tidak mematuhi perintah akses tersebut.

Diputuskan, membenarkan permohonan dan menjatuhkan perintah

pengkomitan terhadap responden dengan hukuman sepuluh hari penjara:

(1) Mahkamah telah merujuk kepada penghakiman Mahkamah Persekutuan di *TO Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151 yang menyatakan bahawa sekiranya kontemnor mempunyai pengetahuan terhadap terma-terma perintah mahkamah walaupun perintah itu tidak diserahkan, mahkamah mempunyai budi bicara untuk mengabaikan keperluan penyerahan perintah mahkamah seperti yang diperuntukkan di A 52 k 4(4) Kaedah-Kaedah Mahkamah 2012. Daripada fakta kes ini, mahkamah ini mendapati bahawa responden dan peguamcaranya mempunyai pengetahuan akan terma-terma perintah akses yang memperincikan tarikh, masa dan keadaan akses untuk pempetisyen. Oleh yang demikian, mahkamah ini mendapati bahawa walaupun perintah akses itu tidak diserahkan, ianya tidak memprejudiskan responden memandangkan mahkamah ini mempunyai budi bicara terhadap penyerahan perintah akses ini terhadap responden (lihat perenggan 32–34).

(2) Mahkamah mendapati bahawa notis untuk sebab telah diberikan secara formal kepada responden. Responden mempunyai notis yang cukup untuk membenarkan pempetisyen membawa keluar anak-anak mereka pada 24 dan 25 Disember 2019. Mahkamah mendapati bahawa walaupun notis diberikan melalui WhatsApp, perkara ini tidak memprejudiskan responden (lihat perenggan 37–38).

(3) Perintah kebenaran ex parte pada 20 February 2020 adalah sah dan responden mempunyai pengetahuan terhadap terma-terma perintah ini. Manakala notis tunjuk sebab dan ketidakpatuhan perintah tersebut telah diberikan yang mana responden juga telah menyatakan di dalam afidavitnya bahawa pempetisyen telah kerumahnya untuk mengambil anak-anak mereka pada 24 dan 25 Disember 2019 dengan responden telah berada di sana dan pempetisyen masih juga tidak dapat berbuat demikian. Oleh itu, responden telah ingkar dengan perintah akses tersebut (lihat perenggan 39).

(4) Di dalam prosiding komital ini, adalah jelas bahawa pempetisyen tidak memohon responden dikomitkan kerana tidak membenarkan pempetisyen keluar dengan anak-anaknya. Oleh yang demikian, prosiding komital ini tidak berdasarkan kepada responden gagal untuk mengambil langkah positif menurut perintah akses. Sebaliknya, anak-anak tersebut di bawah jagaan responden, oleh yang demikian, responden tidak sepatutnya menghalang pempetisyen yang mempunyai hak di bawah perintah akses itu untuk membawa anak-anak mereka ke luar. Dengan usia muda anak-anak tersebut, mahkamah ini tidak dapat menerima bahawa anak-anak tersebut tidak mahu keluar bersama ibu mereka, apatah lagi mereka hanya boleh bersama pada 16 Disember 2019 dan mempunyai had masa hingga 24 Disember 2019 sahaja.

Berdasarkan keadaan-keadaan ini, mahkamah ini mendapati bahawa ketiadaan pengindorsan notis penal adalah tidak fatal kepada prosiding komital (lihat perenggan 54–56).

(5) Mahkamah mempunyai budi bicara untuk tidak mengikut keperluan penyerahan perintah mahkamah di A 45 k 7(7) Kaedah-Kaedah Mahkamah 2012 yang mewajibkan pengindorsan notis penal atas kepentingan keadilan. Keperluan penyerahan perintah akses di dalam kes ini tidak lagi menjadi isu. Oleh yang demikian, mahkamah ini menggunakan budi bicaranya untuk mengabaikan keperluan penyerahan perintah akses dan keperluan pengindorsan notis penal dan ianya terpakai secara terbelakang (lihat perenggan 57).

(6) Undang-undang adalah jelas bahawa mens rea bukanlah elemen yang perlu dibuktikan di prosiding komital. Tiada keperluan untuk membuktikan mens rea dan ketiadaan niat tidak menghalang kontemnor untuk di dapati bersalah di atas penghinaan mahkamah (lihat perenggan 66–67).

(7) Mahkamah ini berpendapat bahawa hukuman pemenjaraan adalah bersesuaian dengan responden mengambil kira kesalahan responden yang menghina mahkamah. Berdasarkan ini, responden adalah dipenjarakan berdasarkan terma tetap untuk kesalahan lepas (lihat perenggan 70).]

Cases referred to

B (JA) (An Infant), Re [1965] 1 Ch 1112 (refd)

Danchevsky v Danchevsky [1974] 3 All ER 934, CA (refd)

Davy International Ltd and others v Tazzyman and others; Davy International Ltd and others v Durnig and others [1997] 3 All ER 183, CA (refd)

General (RTD) Tan Sri Hashim Mohd Ali & Anor v Francis a/l MG Mirandah [2000] MLJU 436, HC (distd)

Gribbles Pathology (M) Sdn Bhd v Adventist Hospital & Clinic Services (M) Bhd [2002] MLJU 619; [2003] 1 CLJ 317, HC (distd)

Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd [2001] 4 MLJ 577; [2001] 4 CLJ 549, CA (refd)

Leow Seng Huat v Low Mui Yein [1996] 5 MLJ 381; [1996] 2 BLJ 466, HC (distd)

Loh Eng Leong & Anor v Lo Mun Sen & Sons Sdn Bhd & Anor [2003] 4 MLJ 284; [2003] 4 CLJ 743, CA (distd)

Lokman Noor bin Adam v PP [2020] MLJU 1040, CA (refd)

OCM Opportunities Fund II, LP and others v Burhan Uray (alias Wong Ming Kiong) and others (No 2) [2005] SGHC 81, HC (refd)

Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal [1994] 2 MLJ 601; [1994] 2 CLJ 705, SC (refd)

A *Syarikat Bekalan Air Selangor Sdn Bhd v Fadha Nur bt Ahmad Kamar & Anor* [2012] 7 MLJ 657, HC (refd)
Syarikat M Mohamed v Mahindapal Singh & Ors [1991] 2 MLJ 112, HC (refd)
TO Thomas v Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151; [1977] 1 LNS 126, FC (refd)
B *Tan Boon Thien & Anor v Tan Poh Lee & Ors* [2021] 3 MLJ 61; [2020] 3 CLJ 28, CA (refd)
Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458; [2012] 2 CLJ 849, FC (refd)

C **Legislation referred to**

Legal Profession (Practice and Etiquette) Rules 1978 r 32
Rules of Court 2012 O 42 r 7(1), (2), O 45 r 7, 7(6), (7), O 52 rr 2B, 3, 4(4)

D *Shassidaren a/l Deva Sana Pathy (Sukhvinder Singh Sindhu with him) (Rajandran Domnic & Co) for the petitioner.*
Raam Kumar (KB Tan Kumar & Partners) for the respondent.

E **Su Tiang Joo JC:**

[1] To protect the welfare of the minor children, the names of the parties are not disclosed.

F INTRODUCTION

[2] After leave was obtained from the court on 20 February 2020 ('leave order of 20 February 2020'), the petitioner wife applied ('encl 99') for an order for committal against the respondent husband; leave having been obtained by reason of the petitioner having satisfied the court on an ex parte application that the respondent was prima facie in contempt of the order of court made on 9 December 2019 (called the 'access order'). The petitioner and the respondent are blessed with three children with interim custody, care and control of their young children given to the respondent.

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[3] The access order, inter alia, ordered that:

(a) the petitioner is given leave to visit their three young children who are living with the respondent at a specified address ('SA' or 'matrimonial home' or 'house' as the case may be) from 16 to 26 December from 8am to 10pm;

(b) in the event the children wish for the petitioner to spend the night with them at the SA, the petitioner is at liberty to do so; and

(c) the petitioner is at liberty to bring her three children out with the respondent being present from the 16 to 26 December commencing 12pm until 6pm within a radius 20km from the SA.

[4] The application ('encl 99') is supported by the statement required by O 52 r 3 of the ROC 2012 (encl 101) wherein the following grounds in support were stated:

> Responden dengan sengaja telah mengingkar Perintah Mahkamah yang bertarikh 9.12.2019 dan tidak membenarkan Pempetisyen untuk membawa keluar ketiga-tiga anak mereka pada 24.12.2019 dan 25.12.2019 sepertimana yang diperintahkan oleh Mahkamah dan dengan itu telah menghina Mahkamah.

ALLEGED CONTEMPT

The petitioner's position

[5] On the 24 December 2019 at about noon, the petitioner went to the SA to bring her children out. Whilst at the SA, the respondent opened the door of the house and when the petitioner requested for their children to go out, they informed the petitioner that they cannot go out with her because their father, the respondent refused to allow them out (encl 100 para 5) ('first incident').

[6] What was said by the children was alleged to be said by the children in front of the respondent who kept silent. The children seemed fearful when they said this to the petitioner. To avoid any row, the petitioner left the house and lodged a police report on this incident on same day (encl 100 exh CG2).

[7] On the following day, 25 December 2019, the respondent allegedly again refused to allow the petitioner to take their children out despite the petitioner having given notice to the respondent of her intention to do so, the day before. The petitioner lodged another police report on this incident ('second incident', see encl 100 exh CG2)).

[8] By reasons of the first and second incidents, the petitioner submits that the respondent had deliberately committed contempt of the access order; the respondent having no respect at all for the authority of the court and had deliberately refused to obey the access order.

[9] The petitioner pointed out that the respondent had already intended to disobey the access order as can be seen in the solicitors for the respondent's letter dated *16 December 2019* to the court (encl 104 exh JPSAV) which was copied to her solicitors with a note saying 'Kindly let us know the place and time you want our client to bring the children to which he will do so. *Your client*

is invited to spend Christmas and any other day she so wish with the children in our client's home'. (Emphasis added.)

The respondent's position

[10] The allegations of the petitioner are false and from the transcripts of the discussions between the petitioner and him, and exhibited in his affidavit in reply (encl 104 exh JPSA-III) there is no evidence that he had not complied with the access order or he had stopped the petitioner from taking their children ('encl 108').

[11] The respondent went on to describe the petitioner as a serial litigator taking into account the history of the various applications filed which she has failed, causing him and their children, whom he described as his children, various problems (see encl 104 para 11).

[12] Reliance is placed upon the case of *Syarikat Bekalan Air Selangor Sdn Bhd v Fadha Nur bt Ahmad Kamar & Anor* [2012] 7 MLJ 657 at p 662 for the principle that 'The standard of proof in contempt proceedings is proof beyond reasonable doubt and when doubt exist it should be resolved in favour of the alleged contemnor'.

[13] That his requirement for a sealed copy of the access order has as yet to be met and with there being no sealed copy, it is of no effect, although he may have been present (in court) when the access order was made (encl 108 paras 4.1 and 4.2).

[14] The WhatsApp or what is described as SMS messages by the respondent in his affidavits (encl 104 paras 6.3, 6.4 and 6.6) but which the respondent is his submissions accepted to be WhatsApp messages (encl 119 para (6)), do not carry any dates and he challenges the petitioner as to which WhatsApp messages are being relied upon to charge him with contempt.

[15] The access period of 24 December 2019 fell on Christmas Eve which is a very important day for going to church and when the petitioner came to the SA which he described as 'his house' but which the petitioner describes as 'the matrimonial home', the children refused to go out and their eldest tried to persuade the petitioner to go into the house but the petitioner refused saying she will be lodging a police report.

[16] On the following day, the 25 December 2019, the petitioner went to what the respondent described as 'his house' but the children refused to go out with her as the children were having fellowship and playing with their relatives

who were in the house and when he invited the petitioner into his house, the petitioner immediately went off with her going into her car.

[17] The respondent added that if the petitioner really loved his children, she could have had lunch with them on 24 December 2019, followed them to church and after lunch on 25 December 2019 persuade the children and take them out in his presence but not only did she refuse but made a false police report.

[18] The respondent concluded by averring on affidavit (encl 104 para 14 and encl 108 para 14.1) that the petitioner has mental issues, is delusional, has made false allegations and is a person of unsound mind.

[19] That despite there being two police reports having been lodged and with the police not having called him up at all, it goes to show that the reports are false.

[20] The failure to have a penal notice endorsed on the access order is fatal to the committal proceedings.

LAW ON CONTEMPT

[21] On the law of contempt, Arifin Zakaria CJ (as His Lordship then was) speaking for the Federal Court in the case of *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458 at p 467; [2012] 2 CLJ 849 at p 858 paras [20]–[23] held that:

> [20] ... A good starting point would be the definition of contempt of court itself. *Oswald's Contempt of Court* (3rd Ed) at p 6 gives a general definition of contempt of court as follows:
>
> To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties, litigants, or their witnesses during the litigation.
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> [21] The jurisprudence for arming the court with the power to punish a contempt is best expounded by Brown J in *Re HE Kingdon v SC Goho* [1948] 1 MLJ 17; [1947] 1 LNS 87 as follows:
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> > But the root principle on which this inherent power to punish for contempt is founded, and the purpose for which it must be exercised, is not to vindicate the dignity of the individual judge or other judicial officer of a court or even of the court itself, but to prevent an undue interference with the administration of justice in the public interest.
>
> [22] Hence, the power to punish a contempt is not derived merely from statute nor truly from common law but instead flows from the very concept of a court of law

(see *Borrie & Lowe's The Law of Contempt*, (3rd Ed), at p 465; and *Master Jacob* [1970] 23 Current Legal Problems 23).

[23] Article 126 of the Federal Constitution empowers the Federal Court, the Court of Appeal and High Courts to punish any contempt of itself. This is repeated in s 13 of the Courts of Judicature Act 1964. However, since the RFC has no procedural provision on committal, therefore, by virtue of r 3 of the RFC, the procedure under O 52 of the RHC may be adopted. Thus, an applicant can bring contempt proceedings via O 52 of the RHC without having to go through the Criminal Procedure Code or the Penal Code even if the relief sought is imprisonment (see *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240; [1997] 3 CLJ Supp 518; *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193; [1986] 2 CLJ 109; [1986] CLJ Rep 58 and *Chung Onn v Wee Tian Peng* [1996] 5 MLJ 521; [1996] 1 LNS 101.

[22] At para [29], His Lordship, Arifin Zakaria CJ cited with approval the following parts of the decision of Cross J in *Re B (JA) (An Infant)* [1965] 1 Ch 1112:

[29] Committal is a very serious matter. The courts must proceed very carefully, before they make an order to commit to prison: and rules have been laid down to secure the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations ...

When, however, one passes away from safeguards which are laid down in the interests of the contemnor and comes to consider mere verbal deficiencies in the documents in question — cases where the documents do not comply strictly with the rules, *but it is impossible that in any conceivable case the contemnor could be in any prejudiced by the defects* — then it seems to me that there is no reason why the courts should be any slower to waive such technical irregularities in a committal proceedings than they would in any other proceedings. (Emphasis added.)

[23] The late KC Vohrah J (as His Lordship then was), an eminent jurist who commanded great respect, in the case of *Syarikat M Mohamed v Mahindapal Singh & Ors* [1991] 2 MLJ 112 at pp 114–115 held that:

'since committal proceedings are quasi criminal proceedings and the liberty of the subject is involved, the procedural rules applicable must be strictly enforced' because the person against whom the committal proceedings are brought 'needs to know with particularity what charge or charges they are faced with, charges which can land them in prison'.

[24] Therefore, during the hearing of the oral submissions on 9 September 2020 on the substantive application for an order for contempt, the court brought to the attention of the parties on the need to issue a show cause notice before seeking leave to commence committal proceedings as provided under O 52 r 2B of the ROC 2012 which stipulates as follows:

In all other cases of contempt of Court [that is other than contempt committed in the face of the Court], a formal notice to show cause why he should not be committed to the prison or fined shall be served personally

[25] The court also drew the attention of the parties to two Court of Appeal authorities, *Tan Boon Thien & Anor v Tan Poh Lee & Ors* [2021] 3 MLJ 61; [2020] 3 CLJ 28 and *Lokman Noor bin Adam v Public Prosecutor* [2020] MLJU 1040 (at para 28 of the yet to be reported decision of Ahmad Nasfy Hj Yasin JCA) which held that it is mandatory that a show cause notice be issued to the proposed contemnor before seeking leave to commence committal proceedings.

[26] Counsel for both the petitioner and respondent were invited to address the court on this requirement as it may have an impact on the integrity of the substantive committal proceedings.

[27] The respondent submitted that as there was no show cause notice issued prior to obtaining leave, the substantive application is vitiated and ought to be dismissed.

[28] The petitioner pointed out that the Court of Appeal authorities were decided after leave had been obtained and, in any event, notice to show cause was in fact given via WhatsApp messages sent by the petitioner to the respondent. The messages said:

[Petitioner to Respondent]

Sorry. I have to take them out as ordered by court. Please rest at home while I take them out.;

I will come to the house around 12:30 to pick them up. Pls get them ready.

Thank you.; followed by

I will wait here for another 5 mins, and if they don't come out, I will make a report to the court (see exhibit CG-3 to Encl 100).

[Respondent to Petitioner]

Yes that's your right and You may do so

[Petitioner to Respondent]

Since the kids went back 2 hrs earlier than what was written in the court order, you owe me another 2 hrs. Therefore the kids will sit with me in church away from your family. You are welcome to sit beside me. Tomorrow we will begin 1 hr earlier to cover for today.

[Respondent to Petitioner]

> Sorry I just saw your message. You can bring this matter up in court if you wish — you have the right. But I am not at going to be a party to change the court ruled times or other details in the order. Thank you.

[29] The respondent replied that these WhatsApp messages were not adequate at all as a show cause notice ought to set out what was the alleged contemptuous conduct and what was needed to be done to redress the same.

SUMMARY OF ISSUES

[30] From the exchange of affidavits, the written submissions and the oral submissions made, the following issues arose for consideration by the court:

(a) non service of a sealed copy of the access order;

(b) whether prior notice to show cause was given;

(c) effect of lack of a penal notice; and

(d) whether the respondent had disobeyed the access order.

[31] The court proceeded to deal with these four issues in the following order:

(a) non service of a sealed copy of the access order;

(b) whether prior notice to show cause was given;

(c) whether the respondent had disobeyed the access order; and

(d) effect of lack of a penal notice.

NON SERVICE OF A SEALED COPY OF THE ACCESS ORDER

[32] The Federal Court in *TO Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151; [1977] 1 LNS 126 held that if the contemnor has knowledge of the terms of the court order though it had not been served, the court has the discretion to dispense with the requirement of personal service. This discretion is provided for under O 52 r 4(4) of the ROC 2012. In *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal* [1994] 2 MLJ 601; [1994] 2 CLJ 705, the Supreme Court held that service of the relevant court order was not essential and all that was required was for the proposed contemnor to have notice of the order that was said to have been breached.

[33] From the facts that obtain, the court finds that the respondent and his solicitors were very much aware of the terms of the access order which were simple and detailed as to the date, time and manner for access.

[34] These facts included the following:

(a) the most telling of which were the respondent's own contemporaneous WhatsApp message of 25 December 2019 saying 'Sorry I just saw your message. You can bring this matter up in court if you wish — you have the right. *But I am not going be a party to change the court ruled times or other details in the order*. Thank you'. (Emphasis added.). and the respondent's own affidavit (encl 104) affirmed on 15 May 2020 wherein he (at para 5) set out with accurate detail what the terms of the access order were;

(b) the respondent's submissions that he does not know which WhatsApp messages are being relied upon, sounds hollow, when by his own affidavit (encl 104 in paras 6 and 7) he was able to put up a transcript of the details of the communication he had with the petitioner and in particular, the exchange of SMS (sic), on the *24 December 2019 through to 25 December 2019* wherein the petitioner has sought for access in accordance with the access order;

(c) from the letter dated 16 December 2019 from his solicitors (encl 104 exh JPSAV) to the court and copied to the solicitors for the petitioner, it was expressly said at p 2 that 'Sekali lagi *dari 16–26 Disember 2019 dari pukul 12pm ke 6pm* responden akan membawa anak-anak ke tempat (dalam radius 20 km) yang pempetisyen ingin';

(d) the terms of the draft access order had in fact been agreed to by both the solicitors for the petitioner and the respondent with both of them having signed off the draft access order (encl 93 exh CG1);

(e) with the provisions of O 42 r 7(1) and (2) of the ROC 2012 providing that a judgment or order takes effect from the date on which it is pronounced, it is indisputable that the access order took effect on it being pronounced on 9 December 2019 which is the date of the order; and

(f) on this issue, the court finds that the non-service of a sealed copy of the access order has not prejudiced the respondent in any way and if at all necessary, in the circumstances that obtain in this case, the court dispenses with service of the sealed copy of the access order on the respondent.

WHETHER PRIOR NOTICE TO SHOW CAUSE WAS GIVEN

[35] The court agrees with the submission of the counsel for the respondent that the decisions of the two Court of Appeal authorities cited above interprets and states what the law is as set out in O 52 r 2B of the ROC 2012.

[36] This rule about the need to issue a prior notice to show cause came into effect on 21 September 2000 (vide PU (A) 342/2000 and see para 28 of *Lokman Noor bin Adam v Public Prosecutor*.

[37] However, the court agrees with the submission of counsel for the petitioner that sufficient prior (formal) notice to show cause had been given to the respondent for the following reasons:

(a) the respondent accepts that the leave order of 20 February 2020 to apply for an order for committal has been validly obtained as to date, the respondent has not taken any steps to have this order obtained ex parte set aside;

(b) the access order gave very detailed and specific timelines on when the petitioner could have access to her children;

(c) from the court records in this action, the access order was one obtained by the petitioner whose application for the same (encl 72) was strongly contested with three affidavits filed, two by the petitioner (encls 73 and 78) and one by the respondent (encl 77) with written submissions (encl 82 by the petitioner and 79 by the respondent) exchanged and oral submissions made on 9 December 2019 which means that the respondent is very much aware of the time allotted to the petitioner; and

(d) the days that the petitioner could have access to her young children were limited to only ten days for the period commencing 16 December to 26 December; and with the clock and the court sanctioned period for access literally ticking away, following from the exchanges of WhatsApp messages set out in para [28] above, the cryptic message by the petitioner sent by WhatsApp to the respondent on 24 December 2019 saying '… if they don't come out I will report to the court' is adequate prior notice in the circumstances. More so, when the respondent replied to say 'Yes that's your right and You may do so' which clearly signify that he has had notice of the same.

[38] From the facts that obtain, the respondent had ample notice of what was required of him, which was to allow the petitioner to take their children out on both 24 December 2019 and 25 December 2019. Bearing in mind the wise words of Cross J in *Re B (JA) (An Infant)* [1965] 1 Ch 1112 quoted in para [22] above, the court holds that that even if there were any verbal deficiencies in the prior show cause notice given via WhatsApp, the same had not prejudiced the respondent.

WHETHER THE RESPONDENT HAD DISOBEYED THE ACCESS ORDER

[39] With the ex parte leave order of 20 February 2020 being lawfully on foot and having found that the respondent is fully aware of the terms of the access order, that prior notice of show cause for non-compliance had been given and with the respondent having affirmed in his affidavit (encl 104 paras 6 and 7) that the petitioner did go to their matrimonial home to pick up their young children on both the 24 December 2019 and 25 December 2019 with him being present but that the petitioner was not able to do so, the court finds that the respondent had disobeyed the access order.

[40] The offer by the respondent for the petitioner to have lunch with the children at the SA on both these dates only serves to aggravate the stark disobedience against the backdrop of the strained relationship between the petitioner and the respondent that necessitated the court in this matrimonial action being called upon and having to make the access order with specific details of the time and conditions limited for access in favour of the petitioner when the respondent has the benefit of custody, care and control of their children.

[41] The court finds that the submissions of the petitioner that the disobedience on the part of the respondent was one that was pre-meditated has merits. The contemporaneous document shows that as early as 16 December 2019 the respondent had through his solicitors sought to have the petitioner spend Christmas at 'his house' as can be seen in his solicitors' letter of 16 December 2019 (encl 104 exh JPSAV). Christmas, of course, falls on 25 December 2019.

[42] The respondent's attempt to explain away such disobedience with having to minister to the spiritual needs of the children by preparing for and having to attend church is misplaced and self-serving as the petitioner had pointed out that the church attendance was required only at night which is after the time specified in the access order. In any event, besides the respondent, the petitioner, who is the mother of their children would also be able and keen to minister to the spiritual needs of their children.

[43] For the sake of completeness, the court does not accept and is not prepared to hold that just because there is no evidence of the police investigating a complaint about what would probably be seen by the police as a matrimonial dispute as absolving the respondent of any wrongdoing in terms of disobedience of a court order.

A LACK OF ENDORSEMENT OF A PENAL NOTICE

[44] Having made all the findings above, the court was further tasked to deal with this final issue.

B

[45] On this issue, the respondent submitted (encl 113 para 4) that the Court of Appeal in the case of *Loh Eng Leong & Anor v Lo Mun Sen & Sons Sdn Bhd & Anor* [2003] 4 MLJ 284; [2003] 4 CLJ 743 clearly held that 'a failure to indorse an order of court with a penal notice is *fatal* to an application for committal proceedings' (see Held [1]).

C

[46] In *Loh Eng Leong*, the order sought to be enforced was for the rectification of the register of members of the defendant company. The order was one that must be done within a prescribed period. However, the time

D period within which the act must be done had not been specified and there was no supplemental order to fix a time period. The Court of Appeal held (at p 290 (MLJ); at p 751 (CLJ)) that:

> There is noncompliance with this requirement as the *time period within which the act must be done has not been specified*. Neither was there a supplemental order to fix

E a time period. The corollary is that the appellants are not entitled to fix the penal notice indorsed on the order. The application before us (for leave to commence committal proceedings) is therefore without merit. Accordingly, we dismissed it without the need to consider an adjournment as requested by the respondents. (Emphasis added.)

F

[47] Unlike the case in *Loh Eng Leong*, when and at what specific times the petitioner was entitled to take the three children out and from where, were specifically set out in the access order. The facts that obtain in the case of *Loh*

G *Eng Leong* can, therefore, be distinguished from the facts that obtain in this case.

[48] However, Augustine Paul JCA (as His Lordship then was) speaking for the Court of Appeal in *Loh Eng Leong* (at p 286 (MLJ); at p 747 (CLJ) paras g

H to h) also said:

> It is true, as contended by learned counsel for the appellants, that a failure to indorse the order of court with a penal notice is fatal to an application for committal (see *Leow Seng Huat v Low Mui Yein* [1996] 5 MLJ 381; [1996] 2 BLJ 466; *General (RTD) Tan Sri Hashim Mohd Ali & Anor v Francis a/l MG Mirandah* [2000] MLJU

I 436; *Gribbles Pathology (M) Sdn Bhd v Adventist Hospital & Clinic Services (M) Bhd* [2002] MLJU 619; [2003] 1 CLJ 317)

[49] From the facts that obtain in *Loh Eng Leong*, what was said by Augustine Paul JCA was not the ratio decidendi of the case but obiter dicta.

[50] As for the other authorities referred to by His Lordship Augustine Paul JCA, they can be distinguished as follows:

(a) in the case of *Leow Seng Huat v Low Mui Yein* [1996] 5 MLJ 381; [1996] 2 BLJ 466, the order required the wife to send their child to the husband's house every Saturday and as this was a *positive act required* of the wife, the court dismissed the committal proceedings for lack of the indorsement of a penal notice;

(b) in *General (RTD) Tan Sri Hashim Mohd Ali & Anor v Francis a/l MG Mirandah* [2000] MLJU 436, the order sought to be enforced *required a payment to be made* by the defendant who failed to make payment and the application to insert a penal notice was dismissed because by the time it came up for hearing the timeline for payment had lapsed and the order was not served personally on the defendant;

(c) in *Gribbles Pathology (M) Sdn Bhd v Adventist Hospital & Clinic Services (M) Bhd* [2002] MLJU 619; [2003] 1 CLJ 317 the injunction order sought to be enforced included making payments of invoices, verification of invoices and resolving differences by way of arbitration which the High Court held to be *positive acts* that require the endorsement of a penal notice onto the order sought to be enforced before it could be enforced; and

(d) in the access order there is no positive act required of the respondent. If at all there is any act that is required, it is only that the respondent is entitled to be present when the petitioner is exercising her court-ordered right of access. The respondent could waive this right, if he so, wishes. In fact, when he notified the petitioner earlier that he was not well, the petitioner informed the respondent 'Please rest at home while I take them out' (encl 100 exh CG3).

[51] The following provisions of O 45 r 7 of the ROC 2012 would be relevant and are set out below:

> (2) ... an order shall not be enforced under rule 5 unless:
>
> (a) a copy of the order had been served personally on the person required to do or to abstain from doing the act in question; and
>
> (b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.
>
> (4) There shall be endorsed on the copy of an order served under this rule a notice in Form 83 informing the person on whom the copy is served:

(a) In the case of service under paragraph (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to obey it;

(5) With the copy of an order required to be served under this rule, being an order requiring a person to do an act, there shall also be served a copy of any order made under Order 3 rule 5, extending or abridging the time for doing the act and where the first-mentioned order was made under rule 5(3) or 6 of this Order, a copy of the previous order requiring the act to be done.

(6) *An order requiring a person to abstain from doing an act may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the Court is satisfied that, pending such service, the person against whom or against whose property is sought to enforce the order has notice thereof either*:

(a) *by being present when the order was made; or*

(b) by being notified of the terms of the order, whether, by telephone, telegram or otherwise.

(7) *Without prejudice to its power under* Order 62, rule 5*, the Court may dispense with service of a copy of an order under this rule if it thinks it just to do so*. (Emphasis added.)

[52] The draft of the access order as signed off by both the solicitors for the petitioner and the respondent can be seen in encl 93 exh CG1. It was not indorsed with a penal notice.

[53] Unlike the case in *Leow Seng Huat* there was no necessity for the respondent to bring their children to the petitioner. Instead, it was the petitioner who had to go over to the SA to collect them.

[54] In this committal proceedings, it is clear that the petitioner is not seeking for the respondent to be committed for contempt for refusing to go along with the petitioner and the children. Therefore, the committal proceedings are not grounded upon the respondent having failed to do *any positive acts required of him under the access order.* (Emphasis added.)

[55] Instead, as the children are under the custody, care and control of the respondent, the respondent ought not to in any way prevent the petitioner from having access which as per the terms of the order allows her to take their children out. With the three children being of tender years, with their ages ranging from eight years of age to that 11 years of age ('encl 1') it is difficult to accept and the court does not accept that the children would on their own volition refuse to go out with their mother, more so when their mother had been taking them out as from the 16 December 2019 with only three more limited days to go by the 24 December 2019.

[56] In the circumstances that obtain in this case, the court finds that the lack of an indorsement of a penal notice is not fatal to the committal proceedings herein. In this regard, the words of Cross J in *Re B (JA) (An Infant)* [1965] 1 Ch 1112:

> ... When, however, one passes away from safeguards which are laid down in the interests of the contemnor and comes to consider mere verbal deficiencies in the documents in question — *cases where the documents do not comply strictly with the rules, but it is impossible that in any conceivable case the contemnor could be in any prejudiced by the defects* — then it seems to me that there is no reason why the courts should be any slower to waive such technical irregularities in a committal proceedings than they would in any other proceedings

and which was cited with approval by our Federal Court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors*, resonates well with the court in the administration of justice to pay heed in ensuring that the orders it makes are strictly obeyed. On this, it is settled law that orders of court must be obeyed.

[57] In any event, if the court can dispense with the service of an order under O 45 r 7(7) of the ROC 2012 which may require the indorsement of a penal notice, if it thinks it just to do so, a failure to indorse a penal notice is surely not mandatory in every case. If at all necessary, the court is of the view that it is just, in the circumstances of this case, for the need for the service of the access order upon the respondent to have been dispensed with and with such dispensation, the need for a penal notice, if at all necessary, no longer becomes an issue. For the sake of good order, the court again formally dispenses with service of a sealed copy of access order and the need for indorsement of a penal notice and such dispensation be with retrospective effect. This, the court is empowered to do under O 45 r 7(6) and (7) of the ROC 2012: *Davy International Ltd and others v Tazzyman and others; Davy International Ltd and others v Durnig and others* [1997] 3 All ER 183 (CA); *OCM Opportunities Fund II, LP and others v Burhan Uray (alias Wong Ming Kiong) and others (No 2)* [2005] SGHC 81.

[58] In the circumstances of this case, the court finds the petitioner has proven beyond reasonable doubt that the respondent has committed contempt of the access order and an order of committal be issued against him.

[59] Marriages are said to be made in heaven but whilst heaven weeps over the upheavals brought about by the disputes in the marriage before the court, let justice be done in accordance with the law. In the administration of justice, the Rule of Law requires there be faithful obedience by each and every party to the order the court has made and the punishment it metes out under the law of contempt, for breach, is to preserve the sanctity of the institution of the court who has been tasked by the law to manage the affairs of those who comes before her, voluntarily or otherwise.

[60] The court then proceeded to hear the parties and in particular the respondent before the court passed sentence for the contempt the respondent has shown to the access order.

[61] The counsel for the respondent submitted that there was no intention to disobey the access order. He went on to submit that the respondent should have been stricter with the children on the 24 and 25 December and that in fact on 26 December, the respondent had taken the children to the house of the petitioner's relatives. The counsel added that the respondent *did not allow* the children to go *without him* because he wanted to follow the court order strictly. (Emphasis added.)

[62] The counsel for the respondent further submitted that the children had been earlier interviewed by the court and they had expressed their wish to remain with the respondent. An independent welfare report put up on the court's directions say the children are very comfortable with the respondent in his house compared to that of the petitioner. Given the paramount consideration is the welfare of the children, nowhere can it be seen that the respondent has acted in any manner or shown any disinterest in the welfare of the children and this should be treated as a mitigating factor.

[63] The counsel for the respondent then sought that the respondent be given a severe warning and there be no custodial sentence imposed. He added that imposing a high fine will not benefit the children as the respondent's business is down, the economy is down and he is resorting to driving Grab. He ended by apologizing to the court and repeated that there was no intention to commit contempt and sought for the trial which was fixed for continuation on 24 and 25 November 2020 not to proceed.

[64] Upon being invited to address the court, counsel for the petitioner made the point that the access order had specific timelines and sought for the sanctity of a court order in the form of the access order to be protected. He sought for the imposition of a fine.

[65] The respondent was then asked whether he wished to make any statement before the court pass sentence. He took the witness stand and said he had no intention to show any contempt for the court and had wanted to do what was expected to him under the court order; that he had not done anything to prevent the children from going with the petitioner.

[66] On lack on intention to disobey the access order, the law is clear that mens rea is not an ingredient to be proved in contempt proceedings. This has been settled by the Court of Appeal in *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd* [2001] 4 MLJ 577; [2001] 4 CLJ 549 where Abdul Hamid Mohamad

JCA (who retired as CJ) in holding that mens rea is not an ingredient to be proved in contempt proceedings said:

> It was also argued that mens rea of the contemnors have not been proved. *The short answer is that mens rea is not an ingredient to be proved in contempt proceedings*. *In Re Attorney-General's Application, Attorney-General v Butterworth and Others* [1963] 1 QB 696, *Donovan LJ said at p 726*:
>
> I conceive the position, however, to be this. *R v Odham's Press Ltd and Others, Ex parte Attorney General* [1956] 3 All ER 494 makes it clear that an intention to interfere with the proper administration of justice is not an essential ingredient of the offence of contempt of court. It is enough that the action complained of is inherently likely to interfere.
>
> This passage was quoted with approval in *TO Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151, see also Chandra Sri Ram v Murray Herbert and the cases referred therein. (Emphasis added.)

[67] The corollary to there being no necessity to prove mens rea is that lack of intention does not prevent a contemnor from being found guilty of contempt.

SENTENCING

[68] The court finds it telling that the petitioner would have been able to exercise her access rights as was submitted by the counsel for the respondent, had the respondent not been lenient towards their children. This position is contradictory to respondent's earlier position when it suited him that the timelines in the access order were to be strictly followed.

[69] In sentencing the court bore in mind that:

(a) the power to punish is founded to prevent an undue interference with the administration of justice in the public interest: *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458; [2012] 2 CLJ 849;

(b) it will not be in the public interest in the administration of justice, if the young children under the custody, care and control of the respondent, are exposed to situations where the authority of a court order is not obeyed. It cannot be gainsaid that one of the principles of our Rukun Negara taught in our schools is 'Kedaulatan Undang-Undang';

(c) there has been no expression of remorse at all with no apology proffered by the respondent in the affidavits he had filed to vigorously resist the committal proceedings;

(d) instead the respondent had indulged in name-calling in his affidavits filed in this committal proceedings by labelling the petitioner as having

mental issues, is delusional and is a person of unsound mind (see encls 104 para 14; 108 paras 14.1 and 111 para 12.2) which can hardly be said to be in the interest of the welfare of the children with their mother is now said by their father to be mentally disordered when what is being sought is to prevent undue interference with the due administration of justice to ensure that a court order when made, is obeyed;

(e) an affidavit is for deposing facts and should not be used as an instrument to hurl abusive opinions and lawyers should be careful that in assisting their clients in drawing up an affidavit they do not unwittingly or otherwise get drawn into the conflict especially one with emotive elements and they should pay heed to r 32 of the Legal Profession (Practice and Etiquette) Rules 1978 which provides that:

> The feeling existing between clients shall not be allowed to influence counsel in their conduct and demeanour towards each other or towards parties and their witnesses in the case.

(f) that the respondent whilst saying that he ought to have been stricter and suggesting that the children were not keen to go with the petitioner, contradicted himself when he had earlier taken the position that he was preparing them to attend church and the inference to be drawn was that the petitioner was to be denied access as the respondent has other plans for the children;

(g) as can be seen, the contemporaneous document (encl 104 exh JPSAV) will drive any reasonable tribunal to the conclusion that the failure on the part of the petitioner to have access on the 24 December 2020 and 25 December 2020 was premeditated. This coupled with the contradictory averments had left the court without any reasonable doubt that the respondent had committed contempt; and

(h) the lack of remorse on the part of the respondent was underscored when despite taking the opportunity to give a statement on oath, he failed to tender any apology at all.

[70] In the circumstances, the court is of the view that a custodial sentence is appropriate for the respondent to reflect upon the contempt he has shown and how the administration of justice had been perverted by the same. On this, if the punishment to be meted is for a past offence, then if the respondent is to be imprisoned, the appropriate order is a fixed term: *Danchevsky v Danchevsky* [1974] 3 All ER 934 (CA). After taking into account the mitigating factors expressed on behalf of the respondent, the court sentenced the respondent to be imprisoned for ten days.

Application allowed (encl 99), order for committal issued against the respondent with ten days imprisonment.

Reported by Muhamad Azham Marwan

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